No. 02-407

Supreme Court, U.S.
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In the Supreme Court of the United States

EVA B. HUNTSINGER,
Petitioner,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

1. Does both an inter-circuit and an intra-circuit split among the Courts of Appeal exist regarding which speech constitutes a matter of public concern under *Connick*?

2. Is a public employee's disclosure of a potential conflict of interest protected under the First Amendment as speech concerning a potential breach of the public trust?

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Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following points in the Brief in Opposition.

REPLY BRIEF OF THE PETITIONER

I. This Court Should Grant Certiorari Because Both An Inter-Circuit And An Intra-Circuit Split Of Authority Exists Regarding Which Speech Is A Matter Of Public Concern And Therefore Afforded Protection Under The First Amendment.

This Court's decision in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), articulates a broad standard to measure when a public employee's speech touches on a matter of public concern. The Court defined speech on a "matter of public concern" as speech which can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. at 1690. The Court instructed the lower courts to determine whether or not speech addresses a matter of public concern by considering the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690.

However, the lower courts inconsistently apply the "content, form, and context" test in that the various courts weigh the factors differently. As noted in the Petitioner's Brief, the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits give determinative weight to the **context** of the speech by emphasizing the role or motive of the speaker. In contrast, the Sixth and Eighth Circuits give determinative weight to the **content** of the speech. Even within the circuits, different panels of the Courts of Appeal apply the "content, form, and context" test inconsistently, as set out in the Respondent's Brief. Both an inter-circuit and intra-circuit split regarding application of the *Connick* test results.

Although *Connick* does not explicitly state the relative weight to be given each factor in the "content, form, and context" test, this Court intended that the content of the speech be the determinative factor. *Id.* at 148-49, 103 S.Ct. at 1690-91. The Court in *Connick* found that the majority of the questions in Myers's questionnaire were not matters of public concern because, if released to the public, they would convey no information beyond a single employee's dissatisfaction with the status quo. *Id.* at 148, 103 S.Ct. at 1691. However, one question addressing pressure on employees to work on political campaigns **did touch on a matter of public concern**. *Id.* at 149, 103 S.Ct. at 1691 (emphasis added). The Court found that there was a demonstrated interest in the country that government service should be based on merit and not politics. *Id.* This question was presented in an identical form and context as the other questions on the questionnaire. However, because the **content** touched on a matter of public concern, the Court afforded First Amendment protection to Myers's speech, at least regarding this limited question. *Id.* The *Connick* analysis reveals that while the form and context of a public employee's speech are relevant in the determination of whether or not that speech touches upon a matter of public concern, the content should be given determinative weight.

The Respondent argues that there is not a definitive split among the Courts of Appeal. Rather, it states that different courts merely emphasize different factors from *Connick* depending on the facts of each case. Brief in Opp. at 3.[1] However, there is a clear split among the Circuits with

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[1] Respondent acknowledges that *Connick* requires consideration of the "unique factual circumstances" of each case. Brief in Opp. at 3. However, the Tenth Circuit Court dismissed Petitioner's case as a result of a F.R.C.P. 12(b)(6) Motion to Dismiss. Therefore, Petitioner has been

regard to which factor receives determinative weight.

The Respondent asserts that the Sixth Circuit looks beyond the content of an employee's speech when determining whether or not to afford protection. Indeed, the Sixth Circuit correctly acknowledges the requirement to review the content, form, and context to determine if speech touches on a matter of public concern. *See Farmer v. Cleveland Public Power*, 295 F.3d 593, 600 (6th Cir. 2002). However, the Sixth Circuit emphasizes the content of a public employee's speech and affords that limited factor critical importance in considering speech under *Connick*. *See Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) *cert. denied*, No. 01-1548, 2002 WL 706612 (U.S. Oct 7, 2002); *Perry v. McGinnis*, 209 F.3d 597, 608 (6th Cir. 2000); *Chappel v. Montgomery County Fire Protection*, 131 F.3d 564, 575 (6th Cir. 1997). *See also Belk v. City of Eldon*, 228 F.3d 872, 880, (8th Cir. 2000) *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734 (2001) (giving determinative weight to the content of the speech after considering the form and context).

By contrast, the Fourth Circuit has recently taken the position that the role, and thus the context, in which the public employee speaks constitutes the determinative factor when considering First Amendment protection. In *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert denied*, 531 U.S. 1070, 121 S.Ct. 759 (2001), the Court stated:

> Thus, critical to the determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'

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denied the opportunity to develop and present the factual basis supporting such a fact-driven analysis of her speech.

Id. at 407 (*quoting Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948 (1987)). *Urofsky* relied upon *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47 (1998) (selection of a play by a high school drama teacher did not involve a matter of public concern because the teacher made the decision in her capacity as a teacher, and thus in her role as an employee). *See Urofsky*, 216 F.3d at 407.

The *Urofsky* court held that even when speech by a public employee involves matters of **"vital concern to the public,"** such employees will not receive First Amendment protection when the employee speaks as an employee as opposed to a citizen. *Id.* (emphasis added).

The *Urofsky* decision contradicts the Supreme Court's analysis in *Connick* and underscores the Circuit split. In *Connick*, Myers spoke in her role as an employee when she distributed the questionnaire to her co-employees. Despite this, the content of one of her questions merited a finding that her speech touched on a matter of public concern. *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691. By contrast, the Fourth Circuit gives determinative weight to the "role" of the speaker, rather than the content of the speech, even where that content may be of "vital concern to the public". *See Urofsky* 216 F.3d at 426-27 (J. Wilkinson's concurring opinion disagreeing with the majority's exclusive emphasis on the role of the speaker); *see also Id.* at 436 (J. Murnaghan dissenting opinion finding that the majority's decision is contrary to the Supreme Court's decision in *Connick*).

Judge Murnaghan's dissenting opinion in *Urofsky* further details an intra-circuit split within the Fourth Circuit. *Id.* at 436-37 (citing *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1080 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2847 (1988) (teacher's speech raised matter

of public concern; although made in her role as an employee, the speech addressed a "matter in which the community... was vitally interested".); *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2278 (1986) (focus should be on the public importance of the speech); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (although *Connick* did not elaborate on the relative weight to be accorded the three factors, the Fourth Circuit has held that content, subject-matter, is always the central aspect.)). *See also Boring*, 136 F.3d at 379 (J. Motz, dissenting, recognizing that the majority gives a determinative weight to the role of the speaker, which is contrary to *Connick*).

An analysis of Seventh Circuit decisions further reveals the existence of both an inter-circuit and intra-circuit split regarding the application of the "content, form, and context" test. In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), the court held that the "touchstone" of *Connick* was the difference between matters of public concern and matters of personal interest. The court then emphasized the role of the speaker by giving determinative weight to the point of the speech. In other words, the court emphasized the employee's motivation in making the speech. *Id.* (*quoting Connick*, 461 U.S. at 147, 103 S.Ct. at 1690). *See also Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (giving determinative weight to the speaker's motivation).

Thus, *Linhart* is contrary to *Connick*. In *Connick*, Myers's point or motivation in asking about pressure to work on political campaigns did not differ from her point or motivation in asking the other questions on the questionnaire, namely to gather "ammunition for another round of controversy with her superiors". *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691. Despite this, the content of this question raised a matter of such significance that the Court deemed the

speech a matter of public concern. *Id.* at 149, 103 S.Ct. at 1691.

In a later decision by the Seventh Circuit, cited by the Respondent, the court held that the content of a public employees speech should receive determinative weight. In *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the court found:

> Although the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive. A fair reading of *Connick* simply will not support the use of such a litmus test. Despite the Court's explicit finding that Myers's questionnaire was motivated by a personal dispute, the content of her speech was paramount to the Court's finding that a public issue was implicated. *This court also has recognized that content is the greatest single factor in the Connick inquiry.*

Id. at 1264 (emphasis in original) (citing *Linhart*, 771 F.2d at 1010 as supporting a position contrary to the *Belk* decision). This decision further reveals an intra-circuit split within the Seventh Circuit regarding which *Connick* factor should receive determinative weight.

Like the Fourth and Seventh Circuits, the Tenth Circuit emphasizes the role or motive of the speaker when determining if a public employee's speech touches upon a matter of public concern. In *David v. City and County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996), *cert. denied*, 522 U.S. 858, 118 S.Ct. 157 (1997), the court, while stating the correct "content, form, and context" standard, found that "the **fundamental inquiry** is whether the plaintiff speaks as

an employee or as a citizen." (Emphasis added.) The Court recognized that individuals, speaking as employees, can speak on matters of public concern under *Connick*, but despite this, the *David* court held that the plaintiff's speech was not protected because she spoke primarily in her role as an employee rather than a citizen. *Id.* at 1356. The result in *David*, therefore, comports with the Fourth and Seventh Circuit analysis set forth above in that the context of the speech is afforded determinative weight.

A decision from the Third Circuit disagreed with the Tenth Circuit's analysis in *David*. In *Azzaro v. County of Allegheny*, 110 F.3d 968, 979 (3rd Cir. 1997), the court found that the inquiry into the role of the speaker provides an alternative way of inquiring into the motive of the speaker. The court went on to state that while motive may be relevant, giving motive controlling significance is inconsistent with *Connick*. *Id.*

Similar to the *David* court, the lower court in Ms. Huntsinger's case gave controlling significance to Ms. Huntsinger's alleged motives in speaking, while giving little weight to the content of the speech. That approach severely discounted the content of Ms. Huntsinger's speech in that she brought to light a potential conflict of interest regarding a publicly funded state toll-way construction project. Petition, App. B at 15a. Where, as here, the content of speech addresses the use of public funds, courts have repeatedly recognized such speech as touching upon a matter of public concern. *See Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996); *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995) *cert. denied*, 517 U.S. 1166, 116 S.Ct. 1565 (1996); *Belk*, 228 F.3d at 878. By placing a greater emphasis on Ms. Huntsinger's alleged motives, rather than the content of her speech, the Tenth Circuit's decision lacks consistency with the analysis set forth in *Connick*.

The Respondent characterizes the Tenth Circuit's inquiry regarding whether or not Ms. Huntsinger's speech addressed active malfeasance by the Authority as an inquiry into the content of the speech. Brief in Opp. at 8. Contrary to the Respondent's argument, however, the court's inquiry reflected its attention to Ms. Huntsinger's alleged **motivation** in speaking, rather than the **content** of the speech. Indeed, the Court went on to discuss Ms. Huntsinger's alleged motives in issuing the speech and, based on that analysis, held that her speech related solely to her personal interest. Petition, App. B at 15a. The court then stated that the complaint lacks specific reference to allegations of the Authority's corruption or malfeasance. *Id.* at 18a. Perhaps most significantly, the Court next determined the "purpose" behind each of Ms. Huntsinger's communications. *Id.* at 18a-19a. In this context, the court continued to emphasize and examine Ms. Huntsinger's motives, ultimately concluding that Ms. Huntsinger sought to deal solely with a personal matter. *Id.* at 20a. The Tenth Circuit's analysis did not sufficiently address the content of Ms. Huntsinger's speech, but focused determinatively on the motivations underlying same.

Indeed, the actual content of Ms. Huntsinger's speech dealt with a potential conflict of interest between her employer and a bidder on the procurement process for a public highway project. Had Ms. Huntsinger left the conflict of interest unaddressed, its existence may have given the appearance of impropriety on the part of the Authority in its distribution of public funds and its public procurement practices. Further, the content of these communications can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. And therefore, Ms. Huntsinger's speech should be protected.

Given the confusion and inconsistency among the lower courts when applying the "content, form, and context" test under *Connick*, the Petitioner requests that this Court grant certiorari to set an authoritative standard which gives determinative weight to the content of a public employee's speech when determining whether such speech is protected under the First Amendment.

II. Speech By A Public Employee Disclosing A Potential Conflict Of Interest Is Speech Concerning A Potential Breach Of The Public Trust, And Should Therefore Be Afforded Protection Under The First Amendment.

The Respondent argues that the Court need not address the question of whether or not the Petitioner's speech concerns a potential breach of the public trust, entitling her to First Amendment protection. Brief in Opp. at 9. However, the Tenth Circuit explicitly rejected protection of speech made as a supposed preemptive strike against possible misconduct. Petition, App. B at 21a. The Petitioner asserts that the facts surrounding her case are the type that the Supreme Court intended to address when it stated in *Connick* that speech meant to bring to light a potential breach of the public trust should be protected. *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691.

As stated both in the Petition and above, Ms. Huntsinger intended to disclose a potential conflict of interest regarding a public procurement on a state toll-way project. Petition, App. F. at 65a-66a. Public employees, such as Ms. Huntsinger, are the keepers of the public trust due to their roles in managing and distributing public funds. Therefore, speech intended to ensure the conduct of such distributions in an unbiased manner should be protected as an attempt to "bring to light... [a] potential wrongdoing or breach of public trust". *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691.

Further, the Respondent characterizes the "predicament" which is the subject of this case as one of Ms. Huntsinger's own making. Brief in Opp. at 10. Contrary to that position, Ms. Huntsinger played no role in "creating" the potential conflict of interest at issue here. In fact, no potential conflict of interest existed until CH2M Hill, the entity which had a potential conflict of interest with the Authority, entered its bid to work on the public highway project. Ms. Huntsinger, who had long been employed at the Authority as a public servant, merely responded to the potential conflict once it became apparent to her. Ms. Huntsinger attempted to deal with the conflict in a manner consistent both with the Authority's prior dealings in similar conflict of interest situations as well as with the Authority's policies regarding disclosure of such conflicts. Therefore, with the Authority's knowledge, Ms. Huntsinger attempted to resolve said conflict accordingly. Thus, the "predicament" underlying this case cannot be fairly attributed to the Petitioner's own making.

The Petitioner requests this Court's grant of certiorari to determine whether or not a public employee's disclosure of a potential conflict of interest is within the purview of a potential breach of the public trust, and therefore protected under the First Amendment.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests this Court's grant of certiorari.

Respectfully submitted,

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